GILBERT ENGINEERING CO INC

v.

ZAINUDDIN AHMAD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[CIVIL SUIT NO: D1-22-4822-1998]
21 SEPTEMBER 2001

CIVIL PROCEDURE: *Pleadings - Striking out writ and statement of claim - Whether claim had reasonable cause of action - Rules of the High Court 1980, O. 18 r. 19(1)(a)*

COMPANY LAW: *Directors - Fiduciary duties - Whether company's directors owed fiduciary duty to company's creditor*

This was an appeal by the defendants against the decision of the senior assistant registrar dismissing the defendants' application under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ('RHC') for an order striking out the plaintiff's writ and statement of claim on the ground that it disclosed no reasonable cause of action. The plaintiff, who was the company's creditor, claimed that the defendants, as directors of the company, had breached their fiduciary duty towards the plaintiff.

Held:

[1] The plaintiff did not condescend upon any particulars in its pleadings to show that the defendants owed it a fiduciary duty. Directors generally do not owe a fiduciary duty to the company's creditors, and there was no indication of any agreement or representation by the defendants which showed that they had assumed any duty to the plaintiff. Such facts were material facts upon which the cause of action was grounded, and should have been pleaded in the statement of claim. Hence, the statement of claim disclosed no cause of action against the defendants, and consequently, the writ and statement of claim was struck out pursuant to O. 18 r. 19(1)(a) of the RHC. (pp 491f, 492 b-c, 493b)

[Appeal allowed.]

Case(s) referred to:
Kuwait Asia Bank EC v. National Mutual Life Nominees Ltd [1990] 3 WLR 297 ***(foll)***
New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 ***(foll)***
Re Tan Kok Ming Phillip [1999] 3 MLJ 74 ***(refd)***
S Manickam v. Ismail [1997] 2 MLJ 90 ***(dist)***

The Board of Trustees of the Sabah Foundation v. Datuk Syed Kechik Syed Mohamed & Anor [1999] 6 MLJ Supp 497 ***(foll)***
United Malayan Banking Corporation Bhd v. Palm and Vegetable Oils (M) Sdn Bhd [1983] 1 MLJ 206 ***(refd)***
Winkworth v. Edward Baron Development Co [1987] 1 All ER 114 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 rr. 7(1), 19(1)(a)

For the appellants/defendants 1 to 5 - Richard Lee; M/s Cheah Teh & Su
For the respondent/plaintiff - Haslina Hassan; M/s Zaid Ibrahim & Co

Reported by Suresh Nathan

JUDGMENT

Vincent Ng J:

This is an appeal by the defendants, namely, defendants 1, 2, 3, 4 and 5, against the decision of the Senior Assistant Registrar (SAR) on 11 September 2000 where the learned SAR dismissed with costs the defendants' application by virtue of O. 18 r. 19(1)(a) Rules of the High Court (RHC) 1980 for an order that the writ and statement of claim be struck out on the grounds that the same do not disclose a reasonable cause of action.

The brief facts of the case are as follows. The plaintiff is a U.S. company and carries on the business of *inter alia*, the manufacture and sale of coaxial and microwave connectors for various applications. All the defendants except the 6th defendant are individuals and were directors of the company. The 6th defendant is a company incorporated under the laws of Malaysia and carries on the business of *inter alia*, commercial trading.

It was submitted by the defendants' counsel that Bina Sat-Com Network Sdn Bhd (Maxis) was one of the plaintiff's customers whereas the 6th defendant was appointed as the plaintiff's agent to render certain services to Maxis pursuant to a contract between the plaintiff and the 6th defendant. It was further alleged by the plaintiff that Maxis paid money directly to the 6th defendant instead of the plaintiff and hence the plaintiff is suing the 6th defendant for the money.

Defendant 1 and defendant 2 are the present directors of the 6th defendant whereas defendants 3 to 5 were the previous directors of the 6th defendant. The plaintiff, in addition to claim against the 6th defendant, is also claiming against defendants 1 to 5 for 'breach of fiduciary duty' as directors of the company, that is, the 6th defendant.

The defendants' appeal pertains to a decision made under O. 18 r. 19(1)(a) RHC 1980 which states:

> (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or ... .

The trite principles of striking out under O. 18 r 19(1)(a) RHC are as follows:

(a) no affidavit/evidence shall be admissible; and

(b) the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action - the test to be applied is whether on the face of the pleading, the court could hold that the cause of action or the defence is obviously unsustainable. This is the principle enunciated in the Federal Court case of *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 *(Kumpulan Kertas Niaga)*.

Having carefully considered both the oral and written submissions of the counsel in the light of the principles laid down in *Kumpulan Kertas Niaga (supra)*, this court is of the view that the writ and statement of claim ought to be struck out for it discloses no reasonable cause of action. The following being the reasons:

(1) The plaintiff did not condescend upon any particulars in their pleadings to show how a fiduciary duty was owed by defendants 1 to 5. Surely, being mere directors does not *ipso facto* bring them into a position of fiduciary relationship with the plaintiff. From the pleadings, there was no indication of any agreement or representation by defendants 1 to 5 which showed that they had assumed any duty to the plaintiff. Their duty was merely to the 6th defendant by virtue of their directorship. It is to be further noted that none of the defendants (whether former or present directors) have signed any guarantee in favour of the plaintiff for any of the 6th defendant's debts, which would have allowed the plaintiff to claim under privity of contract. The plaintiff ought not to be allowed to circumvent this by claiming against defendants 1 to 5 under the guise of 'breach of fiduciary duty', bearing in mind that the contracting parties here are the plaintiff, the 6th defendant and Maxis.

(2) The statement of claim does not plead any particulars to show that defendants 1 to 5 have placed themselves in a fiduciary capacity to the plaintiff. Also, there was nothing to show that defendants 1 to 5, had by

any agreement or representation, assumed any duty (let alone a special or specific duty) to the plaintiff. Indeed, the plaintiff conceded this point but maintained the stand that defendants 1 to 5, being the directors of the company, should be deemed liable as they had full and absolute control of the operation of the 6th defendant. It is trite that a party owes a fiduciary duty only if he has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence (see *The Board of Trustees of the Sabah Foundation v. Datuk Syed Kechik bin Syed Mohamed & Anor* [1999] 6 MLJ Supp 497 at p. 530). Directors generally owe a fiduciary duty to the company but not to the company's creditors, although directors **by agreement or representation** may assume a special or specific duty to the creditor of the company, as was decided in the case of *Kuwait Asia Bank EC v. National Mutual Life Nominees Ltd* [1990] 3 WLR 297 at pp. 298, 315-317. In the present case no such agreement or representation made by the defendants 1 to 5 was pleaded. Such facts are material facts and must be pleaded, as required of O. 18 r. 7(1) RHC 1980 which reads as follows:

> (1) Subject to the provisions of this rule and rules 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the **material** facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits. (emphasis added)

The word 'material' would mean necessary for the purpose of formulating a complete cause of action. And, if any one material statement is omitted, the statement of claim is bad and cannot be made good by affidavit evidence. In other words, it is not sufficient to only plead the legal result or the legal consequences, without the material facts upon which the cause of action is grounded, and which led to such result or consequences. (See the Federal Court case of *United Malayan Banking Corporation Bhd v. Palm and Vegetable Oils (M) Sendirian Bhd* [1983] 1 MLJ 206 at p. 207.) To this, counsel for the plaintiff submitted the case of *S Manickam v. Ismail* [1997] 2 MLJ 90. In that case the words used were 'full particulars', whereas in the case before me, even 'essential particulars' were not forthcoming. Counsel further cited two other authorities, that is, *Winkworth v. Edward Baron Development Co* [1987] 1 All ER 114 at p. 118. However, *Winkworth* is only an authority for the proposition that the directors of a company only owe a duty not to dissipate the assets of the company and thereby cause the company to be in a state of insolvency

and unable to pay its creditors. The case of *Re Tan Kok Ming Phillip* [1999] 3 MLJ 74 would assist the plaintiff's cause only if they had pleaded the circumstances that would *prima facie* show the existence of fiduciary duty. This is a prerequisite before embarking on the step of pleading a breach of that duty.

Given all the above adumbrated reasons I hold that the statement of claim discloses no cause of action against defendants 1 to 5 and allow the defendants' appeal with costs, and consequently, the writ and statement of claim against them is struck out pursuant to O. 18 r. 19(1)(a) RHC 1980.